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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 1033

LINDA McINNIS et al., *Appellant*,

v.

SAMUEL H. SHAPIRO et al., GOVERNOR OF THE STATE OF ILLINOIS, *Respondent*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE RE JURISDICTIONAL STATEMENT OF APPELLANTS

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Amici Curiae

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The undersigned hereby move for leave to file the attached brief relating to the jurisdictional statement of appellants.

INTEREST OF AMICI CURIAE

Our interest in this case relates to law reform. We represent no clients. For three years we have engaged collectively in research and analysis of the issue represented by this case. The synthesis of this research will be available this year in a co-

authored work to be published by the Harvard University Press entitled PRIVATE WEALTH AND PUBLIC EDUCATION. A part of this work — including much of the constitutional analysis — will appear in the April, 1969, issue of the CALIFORNIA LAW REVIEW under the title *Educational Opportunity: A Workable Constitutional Test for State Financial Structures.*

Our knowledge of this case convinces us that certain aspects have not been and may not be adequately presented by the parties. Our particular concern is that the one standard for measuring the State's obligation which we consider workable was not illuminated in the hearing below. Unconsciousness of that standard left the judges effectively disabled by the false assumption that no workable standard exists. Left unchallenged, that assumption could cripple subsequent judicial consideration. We believe it important that, in determining whether to give the appeal plenary consideration, the Supreme Court have the opportunity to appraise the potential relevance of the alternative standard we will suggest.

Consent to the filing of an amicus brief was given by appellants' counsel. A request for consent from the respondent was made in a telephone conference with an assistant attorney general of Illinois on February 4, 1969; to date no response has been received.

Accordingly, we request leave to file the attached brief.

Date: February 14, 1969

Respectfully submitted,

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The nature of the interest of amici curiae is stated in the attached motion (see p. 3 above) and is incorporated herein.

SUMMARY OF ARGUMENT

I.

The decision below was based largely upon a supposed absence of standards. However, the court below rendered its judgment in apparent ignorance of the standard to be proposed herein for evaluating the validity of state systems of public school finance. Summary disposition of the appeal by the Supreme Court would tend to stifle consideration of that standard and of the entire public school financing issue which is now the subject of important litigation in six lower courts. Therefore, the most feasible dispositions of the appeal are either (1) to hold the appeal to await the resolution of and consolidation with similar cases, or (2) to note probable jurisdiction but postpone plenary consideration to await resolution of and consolidation with other pending cases, or (3) to remand to the district court for consideration of the constitutional standard herein proposed.

II.

The following constitutional standard is clear and moderate and is effective to terminate the principal inequity characteristic of public education financial structures:

> The quality of public education may not be a function of wealth other than the wealth of the state as a whole.

III.

There is a multitude of state financing systems — centralized and decentralized—which would satisfy the proposed standard.

ARGUMENT

I. Circumstances suggest that the Court either hold the appeal, note probable jurisdiction and postpone plenary consideration, or remand for further consideration by the Court below.

This appeal is one of rare significance. Potentially it involves the validity of the structure of public educational finance in nearly every state. Whatever its resolution the consequences

for future generations of Americans are immeasurably great. It is the first of at least seven cases raising the fundamental question whether the historic state statutory systems for distribution of educational resources satisfy the Equal Protection clause of the 14th Amendment. The other six cases are in varying stages of trial or appeal. It is most probable that, whatever the outcome in lower courts, the litgants in those cases will seek final adjudication in the Supreme Court of the United States. These cases are the following:

1. *Serrano v. Priest*, No. 938254, Superior Court of California, Los Angeles County (decided January 8, 1969), the appeal in which is now in course of preparation.
2. *Silva v. Atascadero Unified School District No. 595954*, Superior Court of California, San Francisco County.
3. *Board of Eduction v. Michigan*, Civil No. 103342, Circuit Court of Michigan, Wayne County.
4. *Burrus v. Wilkerson*, United States District Court for the Western District of Virginia (docket number unknown).
5. *Rodriguez v. San Antonio Independent School District*, Civil No. 68-175-5A, United States District Court for the Western District of Texas.
6. *Guerra v. Smith*, Civil No. A-69-CA-9, United States District Court for the Western District of Texas, Austin Division.

Deliberation by this Court could be materially assisted by prior consideration of this issue by those courts, state and federal, having jurisdiction of these six suits. Furthermore, the issue could be more sharply defined and alternative resolutions evaluated, if there were an opportunity for scholarly comment, of which there has been far too little. Only since the decision below was rendered have two serious works appeared, each of which might have caused the court to modify its position. One

is a book by Dr. Arthur Wise entitled RICH SCHOOLS, POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY (University of Chicago, 1969); the other is an article by David Kirp, *The Constitutional Dimensions of Equal Educational Opportunity,* 38 HARV. EDUC. REV. 635 (1968). The only published legal analysis of which the court showed awareness is that of Professor Phillip Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined,* 35 U. CHI. L. REV. 583 (1968). The Kurland article was incapable of assisting the court below in its search for standards, since Kurland assumed that no usable standard could be found, and, on that basis, proposed the result reached by the lower court. Kurland was unaware of the standard to be suggested in this brief.

If this were a certiorari case, such unavoidable gaps in the information available to the district court might argue for denial of the petition. Since this case is on appeal, however, there are two offsetting and decisive considerations.

First, summary disposition will constitute a decision on the merits; however intended by the Supreme Court, such a resolution could be accorded excessive deference by the very courts in whose hands this issue now should be taking shape. Even a dismissal for want of a properly presented federal question would risk this result.* Ironically, by forsaking plenary consideration, the Court could be chilling the judicial debate which, in this intensely complex matter, could play a crucial role in illuminating the ultimate choices.

Secondly, any implication, however indirect, that the opinion below has been approved by the Supreme Court would be extremely unfortunate. The court below did not exhibit even a rudimentary understanding of the options open to the judiciary in the handling of this problem. It supposed that, in order to support the plaintiffs, it must impose upon the state either of two centralized alternatives to the existing finance systems — that it must prescribe judicially a 14th Amendment standard either of "educational needs" on the one hand or equal spending

*Should the Court adopt such a course, however, amici urge that the Court specifically limit the application of its decision to this record only.

per child on the other. Unchallenged, this error could be taken seriously by other courts to the permanent misshaping of the ensuing debate. Already this effect has been manifested in a similar case in a California trial court. In *Serrano v. Priest*, No. 938254, Superior Court of California, Los Angeles County, decided January 8, 1969, the trial judge dismissed without opinion, citing as authority the case below.

Given these considerations, we believe that a primary objective to be served is the avoidance of precipitous decision. To that end we respectfully urge that the Court consider three alternative dispositions. Although the courses suggested are somewhat unusual, we are confident that all three procedures accord with prudent administration of the appeals docket. *First*, we suggest most strongly that this Court simply hold the appeal, at least until other courts have had some opportunity to consider this issue. However, *second*, if in this term the Court should note probable jurisdiction, we urge that the appeal be set back on the calendar and full consideration postponed. If either course is adopted, the resulting delay should permit eventual consolidation with one or more of the other six cases now on the trial or appellate level. There would be no disadvantage to the state in such a postponement, as the Illinois system can function in the meantime without interference. Further, it is possible that the delay involved will exceed only slightly the delay normally attendant upon plenary consideration.

As a *third* alternative, the Court could remand the case to the district court specifically for an evaluation of the constitutional standard to be suggested in this brief and/or other standards. The court below felt that it had not been presented a tenable principle by which to test the constitutionality of the state system. If the standard herein proposed appears promising, prudent judicial administration well may suggest that the district court be given the initial opportunity to consider its feasibility and implications. Such a procedure is unusual but scarcely radical. It permits the trial court to reconsider a difficult problem from a perspective which was unavailable to it at the time of its first decision. The court can correct for itself what

may have been an unavoidable error. This procedure is especially appropriate where the other cases raising the same issue are in the earlier stages of litigation and where only the accidents of federal jurisdiction have propelled this case to the Supreme Court level at so early a date.

The rest of this brief will be given over to an examination of the standard here proposed and to a description of a few of the multitude of fair state systems for financing public education which this standard would permit.

II. The principle that wealth should not determine quality is a clear, moderate, and effective standard which would leave broad discretion to the State and would not require equality of spending.

Given its perception of the judicial standards available to test the validity of the state system, the court below had little choice but to act as it did. On the one hand, it was offered a standard of individual students' "needs" which it found unintelligible; on the other loomed the alternative principle of uniformity in spending – one child, one dollar – a standard which was utterly rigid and totally preemptive of state discretion. The court's exit from this seeming dilemma was perfectly understandable. It was also quite wrong. There does exist a clear, moderate, and effective standard for judging the manner in which public education is financed.

That standard is the following:

> *The quality of public education may not be a function of wealth other than the wealth of the state as a whole.*

This principle is effective. The primary fiscal inequity in the Illinois system is the distribution of the educational resources of society according to the wealth (assessed valuation per pupil) of artificial, state-chosen entities, in this case school districts. *

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*Indeed, as is made plain by footnote 8 and the text accompanying footnote 9 of the opinion below, in the case of flat grants to the districts from the State, the state revenue expended goes *only* to the *wealthiest* dis-

Such statutory preference for state-created enclaves of relative wealth is a gross discrimination with awesome implications for the victims residing in poorer districts. It would be prohibited by the proposed standard.

That standard is clear. No inquiry is necessary beyond those facts revealed by the public records of Illinois reporting tax rates, assessed valuations, and pupil populations of the districts, for these clearly demonstrate the powerful and direct correlation between wealth and quality. The court's own figures show it. Actually, even such facts are superfluous, for the invalidity of the system would follow simply from an examination of the statutes attacked. The preference for wealth in the Illinois system is structural, as the court below concedes.

The standard is moderate. Cast in negative terms it would prohibit only the essence of fiscal inequity and require nothing affirmative. The state would not be required to spend for public education in any particular manner; no objection would be made to variations in expenditure; no barriers would be raised to decentralization, preference for gifted students, compensatory aids for the disadvantaged, or any other rational legislative choice. The only limitation upon the distribution of educational resources would be the elimination of wealth criteria.

The district court should be given the opportunity to evaluate this standard and to reconsider its own judgment in the light of it.

III. There exists a multitude of alternative basic systems for financing public education which would satisfy the principle that wealth may not determine quality.

To illuminate further the proposed standard we will suggest a few of the immensely varied systems from which a state

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tricts. Only elementary districts rich enough to raise $353 at a 1% local tax receive *any* benefit from the flat grant (the comparable figure for high school districts is $345.95). To receive *full* benefit from the flat grant the district wealth must be great enough to produce $400 at a 1% tax. What a grotesque and stunning perversion of educational policy — a bonus from the state for being rich!

could choose, if it were denied the power to make educational quality a function of wealth.

De-centralized Systems Satisfying the Principle

At least two general styles of de-centralized systems are imaginable, either of which, alone or in combination with the other, would eliminate the effects of variations in wealth while retaining – indeed increasing – local fiscal control.

District Power Equalizing. A state which wished to emphasize local government could easily equalize the revenue-raising power of school districts by eliminating wealth from the formula now determining a school district's per pupil expenditure. Instead of the educational offering of a district being a function of both district wealth and district tax effort, as now is the case, it would become a function of *effort alone.* The easiest way to perceive this is to suppose that the legislature has adopted a table which specifies how much on the average per pupil each district will be permitted to spend for each level of tax effort it makes against local wealth (preferably income, but, more realistically—considering existing patterns—real property). Such a table might look like this:

Local Tax Rate	*Permissible Average Per Pupil Expenditure*
10 mills (minimum rate permitted)	$ 500
11	550
12	600
13	650
14	700
. . . . .	. . . . .
. . . . .	. . . . .
29	1450
30 mills (maximum rate permitted)	1500

Irrespective of the amount of the local collections, the district would be permitted to spend on the average per pupil that amount – and only that amount – fixed by statute for

the tax rate *locally chosen*. Rich districts and poor districts taxing at 12 mills would provide a $600 education. Poor districts and rich districts taxing at 30 mills would provide a $1500 education. The sole factor determining what a district could spend would be the sacrifice in property tax it was willing to make.

Such a system might, of course, require the redistribution of excess local collections in rich districts and the State's subvention of insufficient collections in poor districts. The magnitude of such adjustments would depend largely on the extent to which the state wishes to pay for the total statewide cost of education out of statewide sources; this in turn would be affected by the extent to which the state wishes to stimulate district effort, using state money as an incentive. A state which was willing to permit the richest district to retain all that it collected locally would be required to assume centrally a substantial portion of the total education budget in order to render the poorest district equal to the richest in its ability to meet the costs of education. The formulas for controlling total cost and the respective state and local shares are infinitely variable, but the effect in any case is to make all districts equal in their *power* to raise dollars for education. The variations from district to district in dollars per pupil spent upon education would thus be a function of local interest in public education. Power equalizing would not guarantee equal dollars per pupil – a goal the court below properly considered fatuous and counter productive. It would merely deny the "right" to have a better school for *less* effort and, thereby, would maximize the incentive for political effort at the local level.

Family Power Equalizing. A state which wishes to emphasize individual choice could apply the power equalizing principle to a different unit. The family instead of the school district could be given the power to decide its own desired level of sacrifice or effort for education. The wealth against which the tax effort would be made would be the family income per child. For each level of self-chosen tax effort permitted by the system, a specific level of spending would be allowed the family for all its children. Each child would be given scrip in the amount

fixed by the statutory formula with which to purchase education. Given appropriate adjustment for marginal utility, cost of living, etc., equal tax efforts would give families of varying wealth access to schools of equal offering.

The state would decide how the necessary range of schools would be provided. If it wished, it could permit both public and private schools to respond to the variety of choices made by families; the resulting system would resemble a market in which public and private educators could meet a variety of demands for quality by spending varying average amounts per pupil. All participating schools (including private schools, if included in the system) would have to accept the scrip as the sole measure of tuition. Otherwise wealth determinants of quality would be reintroduced by the option for parents of varying wealth to supplement the state stipend. On the other hand, private schools not accepting the scrip could charge what they pleased, as they do today. Obviously, many refinements, complexities, and objections are neglected here, but at the least it can be seen that even radical experiments in school finance can satisfy the constitutional standard proposed.

Centralized Financing Systems Satisfying the Principle.

It is difficult to imagine the adoption of any system of public education financed entirely by a statewide system of taxation and distribution which would offend the principle that quality may not be a function of wealth. No state is likely to adopt a *specific* preference for either rich districts or rich families, and any device to achieve that end by indirection would be easily unmasked. All other distributions of public educational resources would be inoffensive to the proffered standard (though some other principle of law could be violated). Of course, centralized financing would not necessarily imply centralized decision making concerning spending. To whatever degree it wished, the state could emphasize local choice in spending the dollars provided by the State.

CONCLUSION

The Court may best effect a prudent resolution of this crucial issue (1) by holding the appeal to await the resolution and consolidation of one or more of the similar cases now in course of litigation, (2) by noting probable jurisdiction and postponing plenary consideration for the same purposes, or (3) by remanding the case to the district court for consideration of the constitutional standard herein proposed or other standards in the context of the Illinois litigation.

Dated February 14, 1969.

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